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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2130 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? Yes

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3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

EXECUTIVE ENGINEER

Versus

DHIRAJLAL JASWANTBHAI

Appearance:

MR TUSHAR MEHTA for Petitioner

MR HK RATHOD for Respondent No. 1

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 20/07/98

ORAL JUDGEMENT

Rule. Mr. H.K.Rathod waives service of Notice of Rule on behalf of respondent. Gujarat Electricity Board(GEB) has filed the present petition to challenge the award passed by the Labour Court, Bhavnagar in Reference No. 36 of 1998.

2. Respondent Dhirajlal Jaswantbhai was working as a daily wager with the present petitioner in the year 1980-1982. It is the case of the respondent that his services were terminated by an oral order on 17.9.1982. It was his further claim that said termination was contrary to the provisions of section 25-G as well as 25-F of the Industrial Disputes Act. He therefore, raised an industrial dispute. It seems that initially when he raised said industrial dispute the statutory authority was not pleased to make the reference to the Labour Court. Therefore, he made a second representation for the purpose of making a reference and on that second representation and on considering his second representation the statutory authority made a reference No. 36 of 1989 to the Labour Court, Bhavnagar.

3. It was the contention of the present petitioner before the Labour Court that the respondent was a daily wager. He was not regularised. He was a daily wager on Nominal Muster Roll(NMR) But since 1986 they have discontinued the system of NMR. It was further contended that as a matter of fact his services were not terminated but he himself had remained absent from duties and as a matter of fact there was no work also available to him It was further contended that on the date when he ceased to appear for the work, he had not completed 240 days service in a year and therefore, in the circumstances there was no question of regularising him and consequently granting him relief which are entitled to a regular worker. Thus it is further contended that the reference made at the instance of the workman deserves to be rejected.

4. Both the sides were permitted to lead evidence in support of their rival claim. On considering the material before the Labour Court, the Labour Court came to the conclusion that the claim of the workman that he had completed 240 days is to be true and that he was retrenched and allowed his claim of reinstatement in view of the material on record .The Labour Court also found that the material on record show that the petitioner had not followed the principle of last come first go. Therefore,in the circumstances the Labour Court allowed the said Reference and directed the petitioner to

reinstate the respondent in service with 70 percent back wages.

5. Learned advocate for the petitioner urged before me that the Labour Court was not at all justified in recording the finding that the claim of the workman that he completed 240 days before the termination. He further urged before me that the Labour Court ought to have accepted the claim of the respondent that his services were terminated, but the Labour Court did not take into consideration the claim of the petitioner that as a matter of fact the workman had abandoned the work. He further contended that the Labour Court has not taken into consideration the documentary evidence produced by the petitioner and inspite of the documentary evidence produced by the petitioner the Labour Court has recorded a wrong finding of fact. He further submitted before me that the Labour Court did into take into consideration the fact that the attempt made by the respondent to make a reference was not accepted by the authorities and the said claim by him was rejected and incidentally his second application ought to have held to be barred on the principle of resjudicata.

6. As against the said contention made on behalf of the petitioner, learned advocate for the respondent Mr. Rathod submitted before me that the findings recorded by the Labour Court are on the basis of the appreciation of evidence before it. He further submitted that from the record and material it is not possible to hold that that said finding of fact recorded by the Labour Court were either perverse or grossly erroneous resulting into causing injustice so as to interfere with the same in exercise of the powers under Articles 226 and 227 of the Constitution of India.

7. The Labour Court has taken into consideration the pleadings of the petitioner as well as the documentary and oral evidence produced by the petitioner and discussion of the same can be found in para 11 of his judgment. The petitioner had produced along with exhs 14 and 19 certain statements showing the dates on which the respondent had attended the work with the petitioner. But after the petitioner had filed those documents, the respondent had given an application before the Labour Court, requesting the Labour Court to order the present petitioner to produce the original NMR on the strength of which said statements were prepared. On the said application of the respondent workman, the Labour Court had passed an order directing the petitioner to comply with the said request and to produce the original NMR.

But inspite of said order of the Labour Court, present petitioner had not produced, the original NMR on the strength of which the statements said to have been prepared and which were produced along with exhs. 14 and and 19. Not only that present petitioner had not produced those original muster rolls, but the officer who has entered the witness box on behalf of the petitioner had also stated in his cross examination that he had not personally verified and seen the entries in the original NMR in order to find out as to whether the statements which were produced along with exhs. 14 and 19 are correct or not. Now when the witness for the petitioner makes such a statement on oath that he had not verified the facts mentioned in exhs. 14 and 19 and when inspite of the court had directed to produced the original muster rolls, on the strength of which said statement exhs. 14 and 19 were prepared were not produced, it could not be said that the Labour Court was not justified in rejecting said statement. In view of the conduct of the petitioner in not producing the original muster rolls inspite of the order of the court and the admission made by the witness of the petitioner that he had not personally verified the facts mentioned in the statements, the entries in the said statement produced by the petitioner along with the original entries in the muster rolls and the respondent had stated on oath that he had worked for more than 240 days, there was no alternative left with the Labour Court but to reject said statement and the claim of the petitioner that the respondent had not worked for 240 days. In view of the said evidence of the witness of the petitioner and the conduct of him, if the Labour Court believed the testimony on oath made by the workman, then it could not be said that this finding is a perversity or a gross error committed by the Labour Court. Therefore, in the circumstances, I am unable to hold that the Labour Court has committed any perversity or gross error in holding that the workman had proved his claim that he had worked for 240 days before the termination in question.

8. Admittedly the respondent was a daily wager. No appointment order was given to him. The workman made a statement on oath that he was orally terminated. The petitioner had taken a stand that there was no termination but the respondent workman himself had stopped attending the work. Along with the said claim, it was also claimed by the petitioner that they had also no work to offer him. Therefore, in view of the said stand taken by the petitioner, the Labour Court has observed that in one breath it was the say of the petitioner that the workman had stopped attending the

work and on the second breath the petitioner says that they had no work to offer to him by observing that the witness of the petitioner has made two contradictory statement before the court. Therefore, it could not be said that that finding given by the Labour Court is perverse or erroneous.

9. The witness of the petitioner has clearly admitted during his cross examination that the junior workmen though, they have discontinued the NMR, were absorbed in service. He has also stated that about 200 to 300 junior workmen were absorbed by the petitioner when they discontinued the NMR in the year 1986. Said admission given by the witness of the petitioner clearly shows that the petitioner had not followed the principle of last come first go. Therefore, in the circumstances, the order passed by the Labour Court directing the present petitioner to reinstate the respondent could not be said to be illegal or improper. In the case of Ratan Singh vs. Union of India 1997(2) SCC 396 it has been held by the Apex Court that provisions of section 25-F and 25-B of the Industrial Disputes Act are applicable to termination even of a daily wager who had workedfor more than one year and continuously worked for 240 days. Therefore, merely because the respondent was a daily wager it could not be said that the Labour Court was not justified in ordering his reinstatement.

10. Thus the above circumstances clearly show that the Labour Court has not committed any perversity or gross error so as to interfere with the finding recorded by the Labour Court ass regards holding that the workman had completed 240 days serves and he deserves to be reinstated in service.

11. Learned advocate for the petitioner very vehemently urged before me that the Labour Court did not take into consideration the fact that earlier the workman had made an application before the authority seeking a reference and that application of him was rejected and consequently second application ought not to have been allowed and it ought to have been held to be barred on the principles of resjudicata. The application made by a workman seeking the order of the competent authority to make a reference is to be considered not as an application requiring any judicial decision. The decision of the authority to make a reference is treated as an administrative action. Therefore, merely because the earlier application filed by the respondent was rejected it could not be said that second application for reconsidering the claim of the workman is hit by the

principles of resjudicatta. In the case of A.S.Production Agencies vs. Industrial Tribunal Haryana AIR 1979 SC 170 879 the Apex Court has approved the action of the State Government in allowing second application by observing that by declining to make reference, Government's power to make referencde is not exhausted and existence of fresh material subsequent to refusal to make reference is not a precondition. The same view is taken by the Supreme Court in the case of Binny Limited vs. Their workmen AIR 1972 SC 1975.

12. But while granting reinstatement with back wages the Labour Court ought to have taken into consideration that the delay caused in making and seeking a reference. The workman was terminated from service on 17.9.1982. The reference in question was made in the year 1989. The Labour Court has not committed any error in rejecting 30 percent wages to the workman. But said back wages in question are denied on the basis that the workman was a daily wager and during this period he must have gainfully employed sometime and somewhere. Therefore, denial of 30 percent wages is not on account of any delay. Therefore, I disallow the back wages to the workman from 16.9.82 to 15.1.89. I would therefore only modify the award of the Labour Court by directing that the workman should be granted back wages from 16.1.89 till the date of reinstatement at 70%. With this modification in the original award rest of the award passed by the Labour Court will have to be confirmed. Thus this petition is partly allowed as indicated above. Rule is made absolute to the aforesaid extent. No order as to costs.

13. Learned advocate for the petitioner wants me to continue the stay order granted in favour of the applicant at the time of passing the first order in this writ petition. But in view of the facts of the case, no stay against the reinstatement of the workman could be granted. Payment of back wages could be stayed for 3 months only on condition that the petitioner should reinstate the respondent workman within four weeks from today. If the respondent is not reinstated within 4 weeks from today, then the stay for payment of back wages will stand vacated.

(S.D.Pandit.J)